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8 UNITED STATES DISTRICT COURT  
9 WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

10 GEORGE PHILIP HERTZOG JR.,

11 Plaintiff,

12 v.

13 CHILD PROTECTIVE SERVICES DEPT  
14 OF SOCIAL AND HEALTH SERVICES  
et al.

15 Defendants.

CASE NO. C11-5899-RBL-JRC

REPORT AND RECOMMENDATION

NOTED FOR: MARCH 9, 2012

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17 This 42 U.S.C. §1983 civil rights matter has been referred to the undersigned Magistrate  
18 Judge pursuant to 28 U.S.C. §§ 636(b)(1)(A) and (B) and Local Magistrate Judges Rules MJR 1,  
19 MJR 3, and MJR 4. Plaintiff is challenging his current conviction and sentence in a civil rights  
20 action and asks that he be released from incarceration (ECF No. 5). He names as defendants  
21 various state agencies and persons involved with his criminal case.

22 The Court recommends that this action be dismissed without prejudice because plaintiff  
23 may not challenge a criminal conviction in a civil rights proceeding.  
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1 This action was filed on October 28, 2011 (ECF No. 1). The Court granted in forma  
2 pauperis status and directed that plaintiff show cause why the action should not be dismissed.  
3 Plaintiff cannot challenge a criminal conviction or the length of his sentence in a civil rights  
4 action (ECF No. 8). Plaintiff asked for an extension of time to respond and that motion was  
5 granted (ECF No. 9, 10, and 11).

6 On January 12, 2012, plaintiff filed a response to the order to show cause, a motion  
7 asking that the Court transfer this matter to habeas, and a motion to amend the complaint (ECF  
8 No. 12, 13, 15). The Court declines to consider this action as a habeas corpus given that in 2006  
9 plaintiff filed a habeas corpus petition that was addressed by the Court (06-cv-5287RJB/KLS).  
10 Plaintiff filed a second petition in 2011 (11-cv-5850RBL/KLS). The motion to amend still seeks  
11 release from incarceration as a remedy (ECF No. 15, page 5). Plaintiff asks that he receive "all of  
12 his aforementioned relief."

13 Plaintiff still seeks release from incarceration and a finding that his sentence and  
14 conviction are improper. He seeks to challenge the investigation that led to him being charged  
15 and convicted (ECF No. 13, page 2). If a plaintiff is challenging the very fact or duration of  
16 physical imprisonment, and the relief sought will determine whether plaintiff is or was entitled to  
17 immediate release or a speedier release from that imprisonment, plaintiff's sole federal remedy is  
18 a writ of habeas corpus. Preiser v. Rodriguez, 411 U.S. 475, 500 (1973).

19 The United States Supreme Court held that "[e]ven a prisoner who has fully exhausted  
20 available state remedies has no cause of action under § 1983 unless and until the conviction or  
21 sentence is reversed, expunged, invalidated, or impugned by the grant of a writ of habeas  
22 corpus." Heck v. Humphrey, 512 U.S. 477, 487 (1994). The Court added:

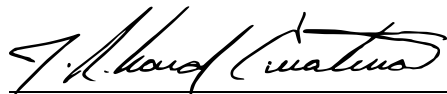
23 Under our analysis the statute of limitations poses no difficulty while the state  
24 challenges are being pursued, since the § 1983 claim has not yet arisen. . . . [A]

1       § 1983 cause of action for damages attributable to an unconstitutional conviction  
2       or sentence does not accrue until the conviction or sentence has been invalidated.

3       Id. at 489. “[T]he determination whether a challenge is properly brought under § 1983 must be  
4       made based upon whether ‘the nature of the challenge to the procedures [is] such as necessarily  
5       to imply the invalidity of the judgment.’ Id. If the court concludes that the challenge would  
6       necessarily imply the invalidity of the judgment or continuing confinement, then the challenge  
7       must be brought as a petition for a writ of habeas corpus, not under § 1983.” Butterfield v. Bail,  
8       120 F.3d 1023, 1024 (9th Cir. 1997) (*quoting* Edwards v. Balisok, 520 U.S. 641 (1997)).

9       The Court recommends that the action be dismissed without prejudice and that all  
10       pending motions be denied. Pursuant to 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b), the  
11       parties shall have fourteen (14) days from service of this Report to file written objections. See  
12       also Fed. R. Civ. P. 6. Failure to file objections will result in a waiver of those objections for  
13       purposes of de novo review by the district judge. See 28 U.S.C. § 636(b)(1)(C). Accommodating  
14       the time limit imposed by Fed. R. Civ. P. 72(b), the clerk is directed to set the matter for  
15       consideration on March 9, 2012, as noted in the caption.

16       Dated this 9<sup>th</sup> day of February, 2012.

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19       J. Richard Creatura  
20       United States Magistrate Judge  
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